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Supreme Court of the United States

OCTOBER TERM, 1929

NO. 528

BROAD RIVER POWER COMPANY, COLUMBIA RAILWAY, GAS AND ELECTRIC COMPANY, and F. D. CAMPBELL, *Petitioners,*

vs.

STATE OF SOUTH CAROLINA, Ex Rel., John M. Daniel, Attorney General, City of Columbia, et al.

SUPPLEMENTAL BRIEF FOR RESPONDENTS ON REHEARING

"It cannot be said that an order compelling the performance of a duty which a corporation is obliged to render as a necessary consequence of the acceptance and continued enjoyment of its corporate rights, at a pecuniary loss, is unreasonable."

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vs.

STATE OF SOUTH CAROLINA, Ex Rel., John M. Daniel, Attorney General, City of Columbia, Town of Arden, Town of Eau Claire, Columbia College, Chicora College for Women, Dr. W. B. Burney, North Columbia Land Company, The Railroad Commission and The Columbia School Board.

SUPPLEMENTAL BRIEF FOR RESPONDENTS ON REHEARING

Respondents herein respectfully submit the following Supplemental Brief in connection with the rehearing:

It is respectfully submitted that the decision already handed down herein and published (281 U. S. 537, 74 L. ed. 1023) is entirely sound, and there is no real merit in any of the grounds of the petition.

ARGUMENT

I.

THIS COURT RIGHTLY FOLLOWED STATE COURT'S CONSTRUCTION AS TO INSEPARABILITY OF CHARTER FRANCHISE

This Court, it is submitted, rightly found that the State Court's construction of petitioners' charter franchise as being a consolidated franchise for the operation of the electric street railway, light and power business as one inseparable public business had fair support and substantial basis, and hence followed such construction.

State Court's Construction Rightly Found to Have Substantial Basis And be Essentially Sound.

This Court, in the opinion written by Mr. Justice Stone first considers whether there is substantial basis for the finding of the South Carolina Supreme Court "that the privilege of operating the street railway is inseparable from that of operating the electric power and light system, and that together they constitute a unified franchise, which cannot be abandoned in part and retained in part without the consent of the state; that so long as respondents retain and operate their electric power system they cannot be permitted to abandon their street railway system."

The opinion then after reviewing the various statutes creating the company and conferring the charter franchise, and commenting upon the facts under which the franchise was exercised, by establishing electric power plants and by using the same poles and wires in its electric street railway, light and power business, and expanding the business of the consolidated company as a single business, held that there was such substantial basis for the State Court's conclusion, saying in part:

The consolidation was effected as authorized. The Consolidated Company acquired the line of street railway of the horse car company, established electric power plants and, under authority of City Ordinance, Ss. 561, 562, of 1892, laid additional tracks and electrified the system by erecting poles and wires in the streets, also, so far as practicable, using them and its rights of way in its electric light and power business. From the organization of the Consolidated Company until 1925, both the street railway and power business of the Consolidated Company were expanded as a single business, its capital stock was increased from time to time, and the system of accounts was such that it did not disclose whether its power system was constructed more from the proceeds of its street railway or its power business.

"Certain facts in this recital of corporate history are of persuasive if not controlling significance in determining the status of the franchise of the Consolidated Company. The Consolidated Company was a new corporation. Its franchises and privileges were granted for its corporate life, extending beyond the duration of the franchises of the two companies consolidated, all of which would have expired before 1921. It had acquired the franchises of the two consolidated companies, one in terms a franchise to operate a railway and a power system, the railway system being for practical purposes dependent upon the power system for its operation, and the privilege of operating both being conditional upon the establishment of the railway system within five years. The Consolidation Act plainly looked to a consolidation of the franchises by the two companies. None of the special legislative acts defining the privileges conferred upon these several corporations contains any words affirmatively providing that any part of the privileges granted should be deemed separable, or that they might be exercised independently of any other."

The Court then, after quoting the language of the South Carolina Supreme Court's decision, and commenting upon "the familiar rule" of *Blair v. Chicago*, 201 U. S. 400, and other cases, concludes by saying:

"* * * * we cannot say that this interpretation of statutes of the State of South Carolina, by its highest court, so departs from established principles as to be without substantial basis, or presents any ground for the protection, under the Constitution, of rights or immunities which the State Court has found to be nonexistent. **It follows that it was within the constitutional power of the State to refuse to permit any partial abandonment of the consolidated franchise.**" Citing 278 U. S. 300, 308; 267 U. S. 330; 244 U. S. 574; 242 U. S. 603; 216 U. S. 262, 277; 269 U. S. 244; 245 U. S. 345; 206 U. S. 1, 25.)

This Court then considers and reaches the same conclusion as to the State Court's interpretation of the effect of the so-called Merger Act.

This Court's own analysis of these facts, it is submitted, clearly shows the essential soundness of the state court's decision.

Court Justified under Authorities in Following State Court's Construction of Alleged Franchise Rights as Property Rights.

Petitioners suggest in their petition ("3" pp. 5-6) that they are not asserting any rights under state laws and that this Court applied the wrong rule as to the effect to be given to the state Supreme Court's decision.

This contention seems to us to require little attention.

It is clear, however, that they are asserting the right derived from, and granted them under, the Consolidation Act of 1891, to operate the electric light and power services in the State of South Carolina, as South Carolina public service corporations, and claiming to operate said services independently of the electric railway service. Of course if they are not asserting these rights under state laws, and if they have no such rights under state laws, then they have no right so to operate said services at all.

Thus petitioners' contention in this matter reduces itself to an absurdity and negatives the very existence of the right which they are in fact asserting.

The construction of franchises enjoyed under state statutes is, of course, primarily a state matter, involving no Federal question. Petitioners are not asserting any impairment of contract rights, but are claiming only "confiscation * * * of property" under the 14th Amendment. (R. 24-25). The right to continue to operate under a charter franchise may rightly be regarded, it is submitted, as it was by this Court in the case at bar, as a property right granted by state statute and subject to the rules governing such property rights.

Cf. *L. & N. R. R. Co. v. Palmes,* 109 U. S. 244, 27 L.ed. 922, saying in construing franchise rights, "if the decision of the question as to the existence of the alleged contract requires a construction of State Constitutions and laws, we are not necessarily governed by previous decisions of the state courts upon the same or similar points, **except where they have been so firmly established as to constitute a rule of property. Such has been the uniform and well settled doctrine of this Court.** *Bank v. Knoop,* 16 How., 369-391," (p. 926).

In view of the previous decision of the South Carolina Supreme Court in the **Spartanburg case,** 130 S. C. 125 (See Main Brief pp. 26-27) (and in *Harmon v. Columbia & Greenville R. R. Co.,* 28 S. C. 401), the rule that under such franchises the electric railway branch cannot be separately abandoned should be regarded as **"firmly established as a rule of property"**, which should be followed by this Court.

Petitioners themselves knew that this was an **established rule of property in this state.** That is why they tried to get relief under the Merger Act. This court, however, has shown conclusively that they are not entitled to relief under that Act.

This Court has always accorded some weight to the decision of the highest court of a state, construing state statues, unless obviously designed to evade the constitutional issue. It was fully justified, it is submitted, under the facts of this case and under the foregoing principle and the authorities cited, (*Nichol v. Cole*, 256 U. S. 222, 225; *Vandalia Railroad v. City of South Bend*, 207 U. S. 359, 367; *Fox River Paper Co. v. Railroad Commission*, 274 U. S. 657, 71 L.ed. 1283; *Enterprise Irrigation District v. Canal Co.*, 243 U. S. 157, 164, 61 L.ed. 644, 648; *Leathe v. Thomas*, 207 U. S. 93, 52 L.ed. 118; *Sauer v. New York*, 206 U. S. 536, 51 L.ed. 1176) in following the state court's decision.

Compare also *Consumers Company v. Hatch*, 224 U. S. 148, 56 L.ed. 703, following state courts' construction of company's charter obligation to make and pay for service connections; *Long Sault Development Company v. Call*, 242 U. S. 272, 61 L. ed. 294, following state courts' construction of grant of charter franchise as unconstitutional.

Even in cases where impairment of contract obligations is claimed this court "leans to an agreement" with the state court, as to the interpretation of statutes or ordinances constituting such contracts. Cf. *Ga. Ry. & Power Co. v. Decatur*, 262 U. S. 432, 67 L.ed. 1065, and cases cited: (*Tampa Waterworks Co. v. Tampa*, 199 U. S. 241-243, 50 L.ed. 170-173; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 595, 45 L.ed. 679, 687; *Detroit v. Detroit Citizens' Street R. Co.*, 184 U. S. 368, 386, 46 L.ed. 592, 607 *Milwaukee Elec. R. & Light Co. v. R. R. Commission*, 252 U. S. 100, 64 L.ed. 476.

See to the same effect: *Stearns v. Minnesota*, 179 U. S. 223, 45 L.ed. 162, (cited in the Texas case).

Compare also *Gilchrist v. Interborough Rapit Transit Co.*, 279 U. S. 159, 73 L.ed. 652, declaring it "a matter primarily for determination by the local courts."

It is apparent in view of the previous decision in the Spartanburg case that there was no attempt on the part of the South Carolina Court to evade the constitutional issue for purposes of this case.

It is to be noted also that the decision of the state court, as well as of this court, as to the inseparability of petitioners' franchise is dependent not only upon the terms of the statute, but also particularly upon the corporate history and physical construction and operation of the system thereunder. Thus the conclusion involves important findings of fact, and in this respect this case may be distinguished from cases which may be relied on by petitioners.

Of course there is no essential conflict between this rule and the holding of the *Texas* case (264 U. S. 79, 68 L. ed. 569) (and like cases) that this Court is not bound, in all events, to accept the State Court's construction as final.

It is submitted therefore that the petition for rehearing does not attack the opinion rendered in this case on any valid ground.

Hence, it is submitted, this case should be dismissed upon the ground stated in the opinion by Mr. Justice Stone.

Without waiving this position, however, we confidently submit furthermore, that the State Court's construction of the charter franchise not only had fair support but is entirely sound. It seems to us that the opinion of this Court written by Mr. Justice Stone in this case so demonstrates. Its soundness is also shown by the authorities cited in our Main Brief and in the second division of this argument.

II.

PARTIAL ABANDONMENT OF FRANCHISE NOT ALLOWED

Petitioners now contend, further, in their petition, ("1" and "2" pp. 1-5) that, conceding the unity of the fran-

chise, they can, under the *North Dakota* case, (236 U. S. 585, 59 L. ed. 735), separately abandon the electric railway phase of the unified franchise.

Utility Required to Operate Branch of Charter Duties Even at Loss if Charter Retained.

(1) A complete answer to this contention, it is submitted, under all the authorities, is that they cannot retain the public franchise, which they value at $1,561,000.00 at least, and at the same time abandon the performance of the public services which were the consideration of the public grant.

This Court itself held in the case at bar, after commenting upon the holding of the State Court as to the consolidation of the franchises, "**that it was within the constitutional power of the State to refuse to permit any partial abandonment of the consolidated franchise.**" (74 L. ed 1031, 281 U. S. 544.)

It is believed that no valid reason or authority can be advanced why this holding should be disturbed.

This Court has uniformly held in all the cases where the question has arisen and where the company was retaining the charter that (as stated in *Brooks-Scanlon v. Railroad Commission*, 251 U. S. 396, 64 L. ed. 323 @ p. 326,) as long as the company "continues to exercise the power conferred upon it by a charter from a state, the state may require it to fulfil an obligation imposed by the charter, even though fulfilment in that particular may cause a loss. *Missouri P. R. Co. v. Kansas*, 216 U. S. 262, 276, 278, 54 L. ed. 472, 478, 479, 30 Sup. Ct. Rep. 330."

United Fuel Gas Co. v. Railroad Commission, 278 U. S. 300, 308, 73 L. ed. 390.

Ft. Smith Light & Traction Co. v. Bourland, 267 U. S. 330, 69 L. ed. 631.

Puget Sound Traction, Light & P. Co. v. Reynolds, 244 U. S. 574, 61 L. ed. 1325.

Chesapeake & O. R. Co. v. Public Serv. Commission, 242 U. S. 603, 61 L. ed. 520.

Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472.

New York ex rel. Woodhaven Gaslight Co. v. Public Serv. Commission, 269 U. S. 244, 70 L. ed. 255.

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Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567.

Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151.

Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194.

It has allowed abandonment only when the entire public franchise has been surrendered. (*Brooks-Scanlon v. Railroad Commission*, 251 U. S. 396, 64 L. ed. 323; *Railroad Commission v. Eastern Texas Railroad Co.*, 264 U. S. 79, 68 L. ed. 569).

In the *Fort Smith* case, *supra*, the Company was required to relay, and continue to operate, a branch street railway line, even at a loss and even though the system as a whole was not earning a fair return.

"A public utility," said the Court, by Mr. Justice Brandeis, "cannot, because of loss, escape obligations voluntarily assumed. *Milwaukee Electric R. & Light Co. v. Wisconsin*, 252 U. S. 100, 105, 64 L. ed. 476, 480, 10 A. L. R. 892, 40 Sup. Ct. Rep. 306. The fact that the company must make a large expenditure in relaying its tracks does not render the order void. Nor does the expected deficit from operation affect its validity. A railway may be compelled to continue the service of a branch or part of a line, although the operation involves a loss. *Missouri P. R. Co. v. Kansas*, 216 U. S. 262, 279, 54 L. ed. 472, 479, 30 Sup. Ct. Rep. 330; *Chesapeake & O. R. Co. v. Public Serv. Commission*, 242 U. S. 603, 607, 61 L. ed. 520, 522, 37 Sup. Ct. Rep. 234. Compare *Rail-*

road Commission v. Eastern Texas R. Co., 264 U. S. 79, 85, 68 L. ed. 569, 572, 44 Sup. Ct. Rep. 247. **This is true even where the system as a whole fails to earn a fair return upon the value of the property * * *.**" (267 U. S. 332-333, 69 L. ed. 633).

In the *Missouri Pac. Ry. Co.* case, *supra*, discussed in our Main Brief pp. 28-29, which is probably the leading case on this question, the company was required to maintain a passenger branch of service though it was conceded that the particular service could be operated only at a loss, and it was contended that the system as a whole "produced no net revenue and left a deficit." The Court, by Mr. Justic White, said it would not even discuss the question of rates and earnings as long as the company retained its charter, that the only question was "whether the order complained of did anything more than command the railroad company to perform a service which it was incumbent upon it to perform as the necessary result of the possession and enjoyment of its charter powers, and which it could not refuse to perform as long as the charter powers remained and the obligation which arose from their enjoyment continued to exist * * *." (216 U. S. 277-278, 54 L. ed. 479.)

Then after discussing the question as indicated in our Main Brief, p. 29, the Court concluded by saying:

> "It may not be doubted that the road, by virtue of the charter under which the branch was built, was obliged to carry passengers and freight, and therefore, **as long as it enjoyed its charter rights, was under the inherent obligation to afford a service for the carrying of passengers * * *.**" (216 U. S. 279, 54 L.ed. 479-480.)

Also in the *Chesapeake & Ohio* case, *supra*, requiring the maintenance by the Company of the passenger branch of its service, it was said, Mr. Justice Van Devanter speaking for the Court:

> "**This duty** arises out of the acceptance and enjoyment of the powers and privileges granted by the state,

and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss. *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 26, 51 L. ed. 933, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; *Missouri P. R. Co. v. Kansas*, 216 U. S. 262, 279, 54 L. ed. 472, 479, 30 Sup. Ct. Rep. 330; *Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 529, 56 L. ed. 863, 870, 32 Sup. Ct. Rep. 535; *Chicago, B. & Q. R. Co. v. Railroad Commission*, 237 U. S. 220, 229, 59 L. ed. 926, 931, P. U. R. 1915C, 309, 35 Sup. Ct. Rep. 560 * * *." (242 U. S. 607-608, 61 L. ed. 522-523.)

The companies here are attempting to abandon, separately, the electric railway service, one of their primal charter duties. This was no doubt regarded at the time of incorporation as the very first and prime charter duty —the chief consideration for the public grant. This is indicated by the original name—the Columbia Electric Street Railway, Light & Power Company. The question involved therefore is whether they shall be allowed to abandon one of their primal charter duties while retaining what they now regard as the more valuable phases of their electric franchise. (Of course the charter contract must be construed as of the time of its making. *Franklin Telegraph Co. v. Harrison*, 145 U. S. 459, 36 L. ed. 776; *Union Pacific Railway Company v. Chicago, Rock Island & Pacific Railway Company*, 163 U. S. Sup. Ct. 564; 41 L. ed. 265; *Rutland & Marble Co. v. Ripley*, 77 U. S. 339; 10 Wall., 339, 365 (19: 955, 960); *Moorhead v. Union, L. H. P. Co.*, 255 Fed. 920; *Western Union Tel. Co. v. Penn. Co.*, 129 Fed. 849; *Texas Co. v. Central Fuel Oil Co., et al.* (C. C. A., 8th), 194 Fed. 1; 25 R. C. L. 205; 36 Cyc. 570.)

It is obvious that this service is, in the language of the *Missouri-Pacific Railway Company* case, "a service which

it was incumbent upon it to perform as the necessary result of the possession and enjoyment of its charter powers, and which it could not refuse to perform as long as the charter powers remained and the obligation which arose from their enjoyment continued to exist."

North Dakota Case Inapplicable: Dealt Only With Rates, Not With Abandonment.

(2) The *North Dakota* case, it is submitted, is clearly inapplicable in that it dealt only with rates and did not touch the question of abandonment.

That case held merely that, as a matter of rate regulation and apart from charter obligations, a state could not by statute, arbitrarily segregate a particular commodity, coal, and fix an inadequate rate thereon in order to build up a local industry, when the evidence indicated the rates could have been properly adjusted so that the coal would bear its proper part of the cost of transportation. In this case the state had by statute, long after the grant of the charter, fixed an inadequate rate on coal, in order to encourage the coal industry. The Court expressly pitched its decision upon the ground that as a matter of rate fixing such action was arbitrary and unreasonable because having no relation to the carriage cost of the commodity or to the charter obligations of the company. It recognized by the reference to the *Interstate Consol. St. Ry. Co. v. Mass.*, 207 U. S. 79, 52 L. ed. 111, case, that its decision would have been different had the obligations imposed been one of those under which "the charter of the company was accepted."

The case did not purport to decide in favor of the abandonment by a corporation of any of its charter functions. The case did not decide that the company could in any event abandon the carriage of coal. The Court itself had said in that case, "As a corporation, the owner is subject to the obligations of its charter. As the holder of special franchises, it is subject to the conditions upon which they were granted." (236 U. S. at 595, 59 L. ed. at 741).

Will it be contended even by petitioners that under that case the company could have abandoned the carriage of coal, even if no adequately compensatory rate could have been found?

Petitioners have completely misconstrued the *North Dakota* case in their petition (p. 2). The interpretation placed on it by petitioners would throw the *North Dakota* case into direct conflict with the *Missouri Pac. Ry. Co.* and the *Chesapeake & Ohio* cases and many other cases herein discussed, holding that a public utility may be compelled to carry on a branch of its business even at a loss, when the charter is retained.

Distinction Between Arbitrary Regulation of Rates and Order Requiring Performance of Primary Corporate Duty Even at a Loss.

There is of course a vast difference between a statute or an order arbitrarily regulating rates and an order refusing to permit the abandonment, or requiring the performance, of a primary function ("primal duty") of a public service corporation. The constitutionality of an order fixing rates depends upon its reasonableness, and a rate cannot be unconstitutional (or confiscatory) unless unreasonable. But an order requiring the performance of a charter function, ("primal duty") even at a loss, as long as the charter is retained, "cannot be said to be unreasonable" (or unconstitutional).

Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933.

Missouri Pac. R. Co. v. Kansas, 216 U. S. 252, 54 L. ed. 472.

Puget Sound Traction, Light & P. Co. v. Reynolds, 244 U. S. 574, 61 L. ed. 1325.

Chesapeake & Ohio R. Co. v. Public Serv. Commission, 242 U. S. 603, 61 L. ed. 520.

Fort Smith Light & Traction Co. v. Bourland, 267 U. S. 330, 69 L. ed. 631.

The distinction was clearly drawn in the *Atlantic Coast Line* case, *supra*, in which the Court, in sustaining an order requiring the establishment of a railway connection even at a loss, pointed out that an order or statute passed after the granting of a charter, creating artificial classes and selecting such classes for legislative favor would be arbitrary and unreasonable, but that the performance of an original "primal" charter duty might be compelled, even at a loss, and that an order compelling the performance of such a duty did not involve "the power to fix rates" or "the constitutional limitations" relating thereto. In drawing the distinction the Court said that "* * * the case in hand * * * does not directly involve any question whatever of the power to fix rates and the constitutional limitations controlling the exercise of that power, but is concerned solely with an order directing a carrier to furnish a facility which it is a part of its general duty to furnish for the public convenience. The distinction between an order relating to such a subject and an order fixing rates coming within either of the hypotheses which we have stated is apparent. This is so because, as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although, by doing so, as an incident some pecuniary loss from rendering such service may result * * *." (206 U. S. p. 945).

The distinction was again pointed out in the *Missouri Pac. R. Co. v. Kansas*, case, 216 U. S. 252, 54 L. ed. 472, in which the Court recognized and applied the same distinction and said that it was not even called upon to consider the question of whether the rates were inadequate; saying.

"The difference between the exertion of the legislative power to establish rates in such a manner as to confiscate the property of the corporation by fixing them below a proper remunerative standard, and an order compelling a corporation to render a service which it was essentially its duty to perform, was pointed out in *Atlantic Coast Line R. Co. v.*

North Carolina Corp. Commission, supra * * *. Speaking of the distinction between the two, it was said (p. 26):

> "This is so (the distinction) because, as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so, as an incident, some pecuniary loss from rendering such service may result * * ." (54 L. ed. 479).

The Court then pointed out that while "as a general rule" the question of pecuniary losses was a circumstance to be considered in connection with the reasonableness of such an order, this did not apply where the Company continued to enjoy its corporate rights.

"But where a duty which a corporation is obliged to render," said the Court, "is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are, in the nature of things, paramount, since it cannot be said that an order compelling the performance of such a duty at a pecuniary loss is unreasonable." (54 L. ed. 479).

This statement really contains the key to this whole line of cases and to the case at bar. "An order compelling the performance of a duty, which a corporation is obliged to render as a necessary consequence of the acceptance and continued enjoyment of its corporate rights, at a pecuniary loss, cannot be said to be unreasonable."

This result, of course, follows from the elementary principle that as long as the company retains its charter privileges it is under contract to perform the services, and hence an order compelling a company to do what it has agreed to do cannot be unreasonable. (See main Brief pp. 57-62 and cases cited).

Distinction Uniformly Recognized by Authorities.

This distinction has been consistently recognized in all the subsequent cases involving the attempted abandon-

ment or neglect of a charter duty ("primal duty"), and upon that ground the *North Dakota* case either expressly or in effect distinguished.

Thus the *North Dakota* case was expressly distinguished in the *Chesapeake & Ohio* case, 242 U. S. 603, 61 L. ed. 520, requiring the establishment and maintenance of the passenger branch of railway service even at a loss, and also in the *Puget Sound Traction, Light & P. Co. v. Reynolds*, case, 244 U. S. 574, 61 L. ed. 1325, requiring the continued operation of a branch street railway line even at a loss, in which the Court said with regard to the *North Dakota* case "In our opinion that decision is inapplicable."

Also the same distinction was recognized and applied in the *New York ex rel New York & Queens Gas Co. v. McCall* case, 245 U. S. 345, 62 L. ed. 337, involving the extension of the gas facilities of the company, and in the *Fort Smith Light & Traction Co. v. Bourland* case, 267 U. S. 330, 69 L. ed. 631, requiring the relaying and operation of a branch street railway line even at a loss; in the *New York ex rel Woodhaven Gaslight Co.* case, 269 U. S. 244, 70 L. ed. 255, requiring the extension even at a loss of the gas service, and in the *United Fuel Gas Co.* case, 278 U. S. 300, 73 L. ed. 390, requiring the continuance of the gas service in certain Kentucky cities, even at a loss, as long as the franchise privileges were enjoyed.

In all the foregoing cases it was conceded that the particular operation or branch of service involved considered alone might require a loss, nevertheless it was held that the performance of that charter duty could not be abandoned.

It is obvious that there is no essential distinction between requiring an electric street railway, light and power company to perform the electric railway branch of its electric franchise, and requiring a railroad company to perform the passenger branch of its transportation duties, or a street railway company to operate a particular branch

of its railway system, or a gas company to install and maintain a branch of its gas service.

This Court itself has pointed out that the rule involved in the *North Dakota* case is inapplicable to the case at bar. (281 U. S. 544).

Petitioners seem to us merely to minconstrue and misinterpret the decision in the case at bar in this regard.

It is believed that this Court meant, by its remark (281 U. S. 544, 74 L. ed. 1032) about a company's not being compelled to serve in a branch of its business "at a rate which is confiscatory" (citing the *North Dakota* case), that such a company could not be compelled to serve **at a rate which has been fixed**, in a branch of its business, **upon an arbitrary and unreasonable basis, where the rate could have been properly adjusted and made adequate**—the expression "a rate which is confiscatory" being equivalent to a rate which has been fixed upon an arbitrary and unreasonable basis—and this Court **did not mean to imply** thereby that such a company could **abandon** a branch of its charter purposes, even if no compensatory rate thereon could be found. Any other interpretation of that remark would be, not only **unwarranted** by the *North Dakota* case and **in conflict** with the many cases cited and relied upon by the Court in its decision, but also would be **inconsistent** with the Court's own previous holding that there could be no **"partial abandonment."**

It may also be conceded that if it should appear "upon appropriate proceedings" that a rate of 7c. or 8c. per passenger, or even more, would yield a fairer return than 5c., then petitioners would be entitled to such higher rate. To insist upon a 5c. rate under such circumstances would be concededly arbitrary and unreasonable. This is what we understand was meant by the Court by its remark in this connection.

Thus the *North Dakota* case, it is submitted, has no bearing upon the case at bar. Here the petitioners are seeking to abandon one of their primary corporate functions, (*i. e.* a "primal duty") namely the operation of the street railway service. The *North Dakota* case would only be relevant had it dealt with the abandonment of the duty to haul coal. Having dealt only with the matter of regulating rates, it is, we respectfully submit, entirely inapplicable.

The essentially similar cases of *Norfolk & W. R. Co. v. W. Va.*, 236 U. S. 585, 59 L.ed. 741 and *Chicago M. & St. P. R. R. Co. v. Pub. Utilities Co.*, 274 U. S. 344, 71 L.ed. 1085 are, for like reasons, equally inapplicable.

It has never yet been held by this Court, we believe, under the *North Dakota* or any other case, that a public service corporation could abandon a branch of its public charter duties, on account of loss on such branch, while retaining the more profitable part of its public privileges. The *Brooks-Scanlon* case (involving an essentially private corporation) and the *Texas* case, both involved the complete surrender of the entire public franchise, and expressly recognized that there could be no partial abandonment of such public franchise. On the other hand, the doctrine established in the *Atlantic Coast Line* and in the *Missouri Pac. R. Company* cases has always been recognized and followed—that, an order compelling the performance of a charter duty, as long as the charter rights are retained, even at a pecuniary loss, cannot be said to be unreasonable (or unconstitutional). To sustain the contention of petitioners herein, it is submitted, would require the establishment of a new rule and the overturning of the settled doctrines and many decisions of this Court—and would be fraught with the gravest dangers to the public welfare.

Suppose the electric lighting system under the charter provisions were the one of the several privileges which

has proved unremunerative, could the company at one stroke, as it did with electric street cars, cut off all the lights of the city including the lights in private dwellings and leave the city in darkness when it had the only franchise for that utility? If so is not every city in the United States in danger and at the mercy of public utility companies owning consolidated franchises for electric light, power, and street railways? Is there any difference in principle when dealing with the question of transportation instead of the question of lighting a city?

Or suppose it were the electric power branch, or the electric heating branch, of its electric system, which it was claimed had proved unermunerative, could the Company abandon such branch?

No Right to Abandon Electric Railway Branch Account Effect Alleged Losses upon Business as a Whole.

(3) Under the foregoing authorities and under the facts of this case, it is submitted there is no right to abandon the so-called electric railway branch on account of the effect of the alleged losses upon the business as a whole.

It is true that in several of the cases dealing particularly with the extension of service (see the *Woodhaven Gaslight Company* case, *supra*, and the *Chesapeake & Ohio* case, *supra*) the Court has intimated that in passing upon the reasonableness of such an order it might consider among other things the effect of the losses "upon the Company's income as a whole." It is submitted, however, that this doctrine has no application to the case at bar. Here the order merely prevents the abandonment of a service which has long been in operation. "It merely requires continued operation" as was said in the *Fort Smith* case. Also as was specifically pointed out in the *Missouri Pac. Ry. Company* case, the doctrine has no application where

as in the case at bar the order complained of only requires the performance of "a duty which a corporation is obliged to render" as "a necessary consequence of the acceptance and continued enjoyment of its corporate rights * * *." (54 L. ed. 479, 216 U. S. 279.)

But even judged by that criterion the order cannot be said to be unreasonable. The company has long been in successful operation; at the time of the so-called transfer the appraised value of its assets exceeded its liabilities by $4,353,511.55 (R. 635), and its franchises were valued at $1,561,000.00; it had always made good earnings (Ex. A-25, A-28, A-41) and has paid good dividends, and in addition during the last two and one-half years of joint operation accumulated a surplus of $627,402.59 (R. 218.) (See Main Brief pp. 14-18.

It may be noted also that the petitioners have given widely varying estimates of the cost of rehabilitating the system: "more than one million dollars" in their answer (R. p. 24, L. 3); "from $550,000.00 to $600,000.00" in the testimony (R. p. 546); $300,000.00 to $500,000.00" in their petition for a rehearing (p. 5). Col. J. Monroe Johnston, a highly competent and disinterested Engineer, testified it would take only $20,900.00 (R. 788-789) to restore the tracks—obviously the most expensive item—to their normal condition.

The Supreme Court of South Carolina did not hold, as stated by petitioners in their petition (p. 2), that "losses from the operation of the street railway business were properly chargeable to the patrons of the electric light and power utility," or that electric light and power rates could be raised so as to make up for any such alleged losses.

Indeed that question was not presented to the Supreme Court of South Carolina and does not seem to us really involved in the case at bar. We, of course, cannot say precisely what the Supreme Court of South Carolina

would hold on this question. There was no showing in the case at bar upon which a proper decision on this question could be based.

Such question could only arise, and be decided, upon application by petitioners to increase the electric light and power rates.

The Supreme Court of South Carolina however, as well as the Railroad Commission, did find (R. 242-250), and the record shows, that the electric railway department alone if properly administered could be made to yield a profit. It could unquestionably be operated so as not to show any loss when proper credits are given, and power charged, as it should be, only at actual cost of production. (See Main Brief pp. 54-46, 71-78). The record also shows and is undisputed that the Company throughout this period, during which it claims to have sustained such losses, was making enough money from its entire property to be able to pay a handsome dividend at all times upon its stock. Indeed, during the past two and one-half years of joint operation (1924-1926) the Broad River Power Company not only paid dividends on the stock, both common (nine per cent in 1925, six per cent in 1926) and preferred (seven per cent annually), but accumulated a surplus of $627,402.59 (R. 217). (This in spite of the $19,000.00* at least contributed by them to the supposedly competing bus company!)

Moreover, the changes in fares and zones, mentioned by petitioners in their petition, were made only during the last few months (R. 420, 542-543) of operation, after petitioners had determined to eliminate the street rail-

*The Transcript of Record in the opinion of the South Carolina Supreme Court (p. 248, line 13) erroneously gives this figure as "$1900.00." Also page 215, line 17 should be corrected by inserting the words "in effect" between the words "is" and "as follows," (see 157 S. C. at 28) and line 13 from the bottom of page 244 by substituting the words "for the so-called electric department" in lieu of "of that system." (See 157 S. C. at 62). This would seem to make the notes in petitioners argument (p. 20, 53) pointless. The opinion is correctly printed in 157 S. C. 1-85, 153 S. E. 537.

way, "if it were possible to do so," (R. 421, 678-679) and were, it is believed, a part of their general scheme to mislead and deceive the public as to the necessity for the alleged losses. The object and effect of these changes was to enable the companies to charge a higher fare than the Bus Company and thereby to destroy the street railway patronage (R. p. 375).

The true reason for the companies' desire to abandon the electric railway is, as we believe, that they can make more money by disposing of the power to outsiders, whereas for the power used in street railway operation they are entitled in reality only to the actual cost of production.

It will be seen upon anaylsis (see Exhibit A-25, R. 1122, R. 557-559, 680-683) that most of the so-called "actual cash losses" so much protested by petitioners consisted not in cash but in power charged at an unjustifiable and exorbitant rate. The so-called "cash losses" thus represented only losses of the double profit sought to be made from power.

It must be apparent that the only thing necessary to make the electric railway service self-sustaining is cooperation and an honest effort on the part of petitioners. The City of Columbia, which has a population of 50,201 people with appoximately 20,000 additional in the suburbs, is the only city in any of the surrounding states of anything like its size that is without electric street railway service. All the neighboring cities of the same and many of even smaller size now have such service; Charleston, S. C. (62,123), Greenville, S. C. (29,081), Anderson, S. C. (22,333), Augusta, Ga. (60,204), Macon, Ga. (53,866), Columbus, Ga. (43,122), Charlotte, N. C. (82,645), Asheville, N. C. (50,167), Raleigh, N. C. (37,512), Winston-Salem, N. C. (75,288), Wilmington, N. C. (32,167), Roanoke, Va. (69,096), Montgomery, Ala. (66,075) (R. 441).

Consequently, it is believed there would be no real losses from the operation of the so-called electric railway department, and this question is therefore entirely academic.

Partial Abandonment Inconsistent With Nature of Charter Franchise.

(4) It follows inevitably from the very nature of a charter franchise that petitioners cannot separately abandon the so-called electric railway branch of their franchise while retaining the electric light and power privileges.

Such a franchise is a contract. (The *Dartmouth College* case). "We have supposed," said the Court in *Chenango Bridge Co. v. Binghamton Bridge Co.*, 18 L. ed. 137, at 142, 70 U. S. 51, "if anything was settled by an unbroken course of decisions in the federal and State Courts, it was, that an Act of incorporation was a contract between the State and the stockholders. All courts at this day are estopped from questioning the doctrine. * * * A departure from it now would involve dangers to society that cannot be foreseen, would shock the sense of justice of the country, unhinge its business interests, and weaken, if not destroy, that respect which has always been felt for the Judicial Department of the Government * * *." (p. 142). (Quoted in *New Orleans Gas Light Co. v. La. Light, Etc. Mfg. Co.*, 115 U. S. 650, 29 L. ed. 516).

The grant of a franchise is "intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant * * * *." *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 83, 25 L. ed. 950, 952. It is to be construed primarily in the public interest. (*Blair v. Chicago*, 201 U. S. 400, 50 L. ed. 801 and cases cited).

In consideration of the privileges granted the company undertakes to perform the services authorized. (See

Missouri Pacific v. Kansas, 216 U. S. 252, 54 L. ed. 472; *United Fuel Gas Co. v. Railroad Commission,* 278 U. S. 300, 73 L. ed. 390; *Chesapeake & O. R. Co. v. Public Serv. Commission,* 242 U. S. 603, 61 L. ed. 520). "A public service corporation by accepting the rights and privileges conferred by its act of incorporation and by entering into the enjoyment of its franchises undertakes to perform all the public duties required of it," *Attorney General, Ex Relatione Corporation Commissioner v. Haverhill Gas Light Co.,* 215 Mass. 394, Annotated Cases, 1914C p. 1266. "Such companies * * * * are to be held as having assumed the obligation to fulfill the public purposes to subserve which they were incorporated." *Gibbs v. Consolidated Gas Company,* 130 U. S. 296; 32 L. ed. 985.

How then can it be suggested that the company can abandon the more troublesome while retaining the more profitable features of the contract? Would not this offend against every sense of justice? Yet is not this in principle what petitioners are trying to do, and trying to get this Court to approve?

Indeed the obligation to perform the electric railway service is inherent in the very nature of the corporate franchise and of the corporation itself. It was created for that very purpose. This purpose was indicated in its corporate charter name—Columbia Electric Street Railway, Light & Power Company. Apart from its duty and obligation to perform that service it has no right even to exist. The breath of its corporate life was breathed into it by the State of South Carolina for that purpose and the performance of that duty may be said to be the very essence of its corporate being. Failure to perform that inherent corporate function should mean the death of the corporation itself.

This we believe is the doctrine which has uniformly been recognized and applied by this Court as to public

service charters and corporations. This is what we understand was meant by the Court in the *Atlantic Coast Line* case (206 U. S. 1, 51 L. ed. 933), when it said the duty to furnish the service was "coterminous with the powers of the corporation" (51 L. ed. 941). Or as it was said in the *Chesapeake and Ohio* case, (242 U. S. 603, 61 L. ed. @ 522): "This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the state, and endures so long as they are retained."

Also, the electric railway is inseparably bound up with the electric light and power phases of its franchise not only by charter but by physical construction.

Petitioners, however, realizing the general rule against partial abandonment have suggested, in the petition (p. 4), as a possible means of escape from the foregoing doctrines, that the electric railway and electric light and power phases of the business are "essentially different public services."

If that be so, then why did the Company accept the charter originally for electric railway and electric power combined, and making the electric power and electric railway franchise dependent upon the operation of the electric railway within five years? Why did it thereafter apply for and have all the franchises, electric railway and electric power and electric light consolidated into one charter?

The companies having accepted such a charter, and having, under such charter, so conducted their business as one business over a long period of years, should not now be heard to say that they are "essentially different" public services.

Moreover, we submit this contention is particularly unsound, as applied to the facts of this case, in which the services were for over 35 years constructed and operated

jointly. (See Supreme Court's Decision, R. 221-228; Main Brief pp. 8-18, 31-35). This Court itself has pointed out that the railway system is "for practical purposes dependent upon the power system for its operation." (74 L. ed. 1031).

It would seem that no further reply to this contention is necessary.

The underlying principle involved in this phase of the question is clear and free from doubt. It rests upon the eternal principle of justice that such a public service corporation must perform the duties which are the consideration for the public benefits which it has received. Such a corporation "cannot be permitted to enjoy the benefits conferred by its charter without incurring the responsibilities incident thereto." *Harmon v. Columbia & Greenville R. R. Co.*, 28 S. C. 401.

The consideration received by the company was the right to carry on not one but all of the services for the period of fifty years and to charge tolls therefor. This right alone it values at over $1,561,000.00. This consideration with all its benefits it is retaining. The corresponding obligation to perform all the services as long as any of the considerations are retained necessarily follows: "The Constitution does not confer upon the company the right to continue to enjoy the franchise or indeterminate permit, and escape from the burden incident to its use." *Fort Smith Light & T. Co. v. Bourland*, 267 U. S. 331, 69 L. ed. 633.

This Court has held, 281 U. S. 544, 74 L. ed. 1032, and it is our view, that this case does not involve rates. Petitioners, however, insist in their petition ("2" pp. 4-5) that the question of rates is involved and that the obligation of the company to perform "at some rate" must be considered. Even if that be so, then it must be held that, as long as petitioners retain their charter privileges, they are under a contract obligation to perform said service at

some rate and the question of loss is therefore entirely immaterial. (*Henderson Water Company v. Corporation Commission of North Carolina et al.*, 278 S. C. R. 282; 70 L. ed. 273. *Fort Smith Light & T. Co. v. Bourland*, 267 U. S. 330; 69 L. ed. 631. *St. Cloud Public Service Co. v. City of St. Cloud*, 265 U. S. 352; 68 L. ed. 1050. *Paducah v. Paducah Railway Co.*, 261 U. S. 267; 43 Sup. Ct. Rep. 335; 67 L. ed. 647. *Georgia Railway & Power Co. v. Town of Dacatur*, 262 U. S. 431; 67 L. ed. 1065. *Southern Iowa Electric Co. v. Chariton*, 255 U. S. 539, 65 L. ed. 754. *Milwaukee Elec. Ry. & L. Co. v. State of Wisconsin, etc.*, 252 U. S. 100; 64 L. ed. 476. *Columbus R. P. & Light Co. v. Columbus*, 249 U. S. 399; 63 L. ed. 669. *Michigan Ry. Co. v. Lansing*, 260 Fed. 322. *Spartanburg v. Spartanburg Gas & Elec. Co.*, 130 S. C. 125. *Charleston Consolidated Ry. & Lighting Co. v. City Council of Charleston*, 92 S. C. 127. *Sumter Gas & Power Co. v. Sumter*, 283 Fed. 931 (4th Circ. 1922), 10 A. L. R. (note), 897. (See also Main Brief pp. 57-62).

Abandonment of Charter Duties Not Allowed Unless all Charter Privileges Surrendered.

(5) Accordingly it is settled that a public service corporation cannot abandon or surrender its charter functions merely because it cannot earn a fair return upon each branch or even upon its entire public business, but only when its entire public service can be operated only at a loss, and when it has surrendered all its charter privileges. (See above cited cases and cases cited on pp. 23-24 of Main Brief).

Compare also:

The Brooks-Scanlon case, 251 U. S. 396, 64 L. ed. 323.

The Texas case, 264 U. S. 79, 68 L. ed. 569.

The Constitution does not guarantee a public utility any particular return upon its entire investment, much

less upon each phase or branch of its business. (*Fort Smith L. & T. Co. v. Bourland,* 267 U. S. 330, 69 L. ed. 631; *Milwaukee Electric Ry. & P. Co. v. Wisconsin,* 252 U. S. 100, 64 L. ed. 476, saying that "there is no warrant in law for the contention that merely because its business fails to earn full six per cent upon the value of the property used, the company can escape * * obligations voluntarily assumed * * *. Compare *Missouri P. R. Co. v. Kansas,* 216 U. S. 262, 279, 54 L. ed. 472, 479, 30 Sup. Ct. Rep. 330; * * * **" (p. 480, 64 L. ed.)

Will it be contended even by petitioners that they could abandon all or any of their charter functions if they could earn on their total investment only five per cent or four per cent or even less?

The result of the cases on this subject is that a utility is entitled to be protected against arbitrary rate regulation even as to each branch or phase of its business, if such branch or phase can be segregated and a reasonable rate devised which will yield a return thereon. If, however, no rate can be found which will enable a public utility to make an adequate return upon each branch or phase, or indeed all, its property devoted to the public business, then different principles come into play. The public needs come ahead of the interests of the stockholders. A public utility must then continue to perform the public service requirement whether it can secure a compensatory rate or not, provided it is not required to operate its entire public business at a loss. It must continue to perform the public duty and the public services for which it was created as long as it can make expenses, and as long as it retains any of its charter privileges.

In other words, so long as they continue to do business under their charter in this State "and to their avail of the extraordinary privileges extended to public utilities" (compare *United Fuel Gas Co.* case, 278 U. S. at 309, 73 L. ed. 396) they cannot abandon any of their charter functions.

These principles, we submit, are so firmly settled and established by all the foregoing cases which have been cited by this Court in its opinion (281 U. S. 544, 74 L. ed. 1031-1032), and even recognized in all the cases chiefly relied on by petitioners, *The Texas* case, 264 U. S. 79, 68 L. ed. 569, and *Brooks-Scanlon v. Railroad Commission*, 251 U. S. 396, 64 L. ed. 323, as to be no longer open to question.

Petitioners Must Either Perform Service or Surrender Entire Charter.

(6) The sum and substance of this phase of the matter is:

Petitioners must either perform the service or surrender the entire charter. If they do not choose to perform the service then they must surrender the entire charter.

No doubt there are plenty of other interests who would be glad to accept the charter and franchise,—burdened, if need be, with the electric railway duties.

If petitioners do not choose to surrender the charter, then the retention of the charter must be deemed sufficient consideration for the performance of the electric railway service.

The requirement of such service in view of such consideration cannot be said to be confiscatory.

This is the view, it is believed, which is supported by both reason and authority.

SUMMARY AND CONCLUSION

This brief is only supplementary to the main Brief already filed herein. We rely for affirmance of the judgment upon all the grounds and arguments advanced in our main Brief and upon all the grounds stated by the South Carolina Supreme Court.

The fundamental question involved in this aspect of the case is whether petitioners and like public service corporations shall be allowed, under the United States Constitution, to retain and enjoy the public franchise and privileges, which were granted to them by the State primarily for the public benefit, and at the same time abandon the performance of the services which were the consideration for the public grant.

This Court has always answered such questions emphatically in the negative. It has uniformly, repeatedly, and consistently, recognized and applied the principle that public service corporations must serve the public, and that they cannot enjoy and exercise state privileges or grants without performing, if need be at a loss, the services required by the State as the consideration for such privileges.

These principles have been applied notwithstanding it was contended and conceded that the performance of the particular branch of service considered alone would necessitate a loss; in the recent *Fuel Gas Company* case, 278 U. S. 300, 73 L. ed. 390, so as to prevent a company from abandoning its gas service in certain cities in a state; in the *Woodhaven Gaslight Company* case, 269 U. S. 244, 70 L. ed. 255, so as to require a company to extend its gas service; in the *Fort Smith* case, 267 U. S. 330, 69 L. ed. 631, so as to prevent a street railway company from abandoning a branch of its lines; in the *New York & Queens Gas Company* case, 245 U. S. 345, 62 L. ed. 337, so as to prevent a gas company from neglecting to serve a portion of its territory; in the *Puget Sound Traction, Light & P. Company* case, 244 U. S. 574, 61 L. ed. 1325, so as to prevent a company from abandoning a branch electric railway line taken over from another company; in the *Chesapeake & Ohio* case, 242 U. S. 603, 61 L. ed. 520, so as to require a railroad company to install and maintain the passenger service on a branch line; in the *Missouri Pac. R. Company* case, 54 L. ed. 472, 216 U. S. 252, likewise so as to prevent a com-

pany from abandoning the passenger service on a branch line taken over from another company; and in the *Atlantic Coast Line* case, 206 U. S. 1, 51 L. ed. 933, so as to require a company to establish a connection with another railroad; and in the numerous other cases cited and referred to in the above cited cases or in our brief. The *North Dakota* case did not involve abandonment; and the *Texas* case, 264 U. S. 79, 68 L. ed. 569, and the *Brooks-Scanlon* case, 251 U. S. 396, 64 L. ed. 323, relied upon by petitioners, did not involve the continuance of the enjoyment of the public franchise or privileges but the abandonment of them entirely, and in those cases and in all other cases in this Court, so far as we have been able to discover, this Court has uniformly recognized and applied the same doctrine.

No reason is seen why an exception should be made in favor of petitioners, particularly in view of their unprecedented conduct, and of the admitted value (at least $1,561,000.00) of the franchises retained.

The Broad River Power Company interests were anxious to acquire the Columbia Railway, Gas & Electric (Columbia Electric Street Railway Light & Power) Company stock and franchise. They were also anxious to get rid of the electric railway branch of the duties. But they were more anxious to acquire the franchise privileges. They chose to receive the privileges at the hands of the State, but to rid themselves of the transportation duties in their own way. They are now enjoying the privileges. They have no right then to complain when they are required by the State and by the Courts to perform the service.

It is therefore respectfully submitted, for all the foregoing reasons, that the opinion already rendered herein

is sound and should be allowed to stand. Petitioners should be required to perform the electric railway service.

Respectfully submitted,

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